

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
March 25, 2009 Session

DEBORAH M. GENTILE v. MICHAEL C. GENTILE

**Direct Appeal from the Chancery Court for Williamson County
No. 32768 R. E. Lee Davies, Judge**

No. M2008-00734-COA-R3-CV - Filed April 14, 2009

The trial court found Husband to be in criminal contempt during the pendency of a contested divorce action and imposed a sentence of ten days in jail, suspending eight days conditioned upon Husband's completion of a parenting class. The trial court did not find Wife in contempt for failure to comply with its discovery order. Husband appeals. We reverse in part and affirm in part.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Reversed in part;
Affirmed in Part; and Remanded**

DAVID R. FARMER, J., delivered the opinion of the court, in which ALAN E. HIGHERS, P.J., W.S., and HOLLY M. KIRBY, J., joined.

Connie Reguli and Deana Hood, Brentwood, Tennessee, for the Appellant, Michael C. Gentile.

Dana C. McLendon, III, Franklin, Tennessee, for the Appellee, Deborah M. Gentile.

MEMORANDUM OPINION¹

This appeal arises from the trial court's judgment on the parties' cross-petitions for criminal contempt. Defendant/Appellant Michael C. Gentile ("Husband") and Plaintiff/Appellee Deborah M. Gentile ("Wife") were married in September 2004 and have one minor child. In August 2006, Wife filed for divorce in the Chancery Court for Williamson County. Husband answered and counterclaimed in March 2007. On March 20, 2007, the trial court entered an agreed order whereby

¹ Rule 10 of the Rules of the Court of Appeals of Tennessee provides:

This Court, with the concurrence of all judges participating in the case, may affirm, reverse or modify the actions of the trial court by memorandum opinion when a formal opinion would have no precedential value. When a case is decided by memorandum opinion it shall be designated "MEMORANDUM OPINION", shall not be published, and shall not be cited or relied on for any reason in any unrelated case.

the parties agreed that neither would make derogatory remarks about the other in the presence of their child, or threaten, harass, or invade the privacy of the other throughout the divorce. In May 2007, Husband filed a motion to compel wife to respond to interrogatories and requests for production delivered on or about March 28, 2007. On June 6, the trial court granted Husband's motion to compel in accordance with Rule 37 of the Tennessee Rules of Civil Procedure. Following a hearing on October 23, on November 6, 2007, the trial court entered an order finding Wife had failed to disclose certain documents regarding her bank accounts and ordered her to provide them to Husband's counsel no later than 5:00 PM on November 2, 2007.

On November 27, 2007, Husband filed a petition for contempt asserting Wife had failed to comply with discovery requests as ordered by the court. Husband prayed for Wife to "be held in willful contempt and incarcerated for each day in which she has refused to produce these documents since November 3, 2007." Although Husband's petition did not state whether it was one for civil or criminal contempt, Husband provided notice to Wife that she was being charged with criminal contempt pursuant to Tennessee Code Annotated § 29-9-101.

On December 18, 2007, Wife filed a petition for criminal contempt alleging that Husband had violated the trial court's order of March 2007. In her petition, Wife alleged that Husband had screamed an obscenity at her during an exchange of their child on April 17, 2007, in contravention of the court's order prohibiting either party from making disparaging remarks about the other. She further alleged Husband had engaged in an "escalating pattern of abusive, hostile, and venomous actions" toward Wife.

The trial court heard the cross-petitions in February 2008. The trial court determined that the allegations contained in Husband's petition, even if true, did not constitute grounds for criminal contempt under Rule 37 of the Tennessee Rules of Civil Procedure. The trial court further found Wife's testimony that she had produced all the bank records in her possession, custody, and control to be credible. The trial court additionally noted that Husband had stipulated that Wife had executed a release by which he was able to obtain any bank records that might exist. The court accordingly dismissed Husband's petition with prejudice.

The trial court also found, beyond a reasonable doubt, that Husband had committed criminal contempt of the court's March 2007 order by screaming an obscene remark at Wife without provocation in April 2007. The court found that Husband had admitted that he knew his remarks violated the terms of the court's March order, and that Husband had willfully and deliberately disobeyed the court's order. The court found Husband's assertion that Wife had provoked him to be not credible and found Wife's testimony on the matter to be credible. The court sentenced Husband to be incarcerated for a period of ten days, but suspended all but 48 hours conditioned on Husband's completion of a parenting class within 90 days of the order. The trial court's order was entered on March 11, 2008. Husband filed a notice of appeal to this Court on April 8, 2008.

Issues Presented

Husband presents the following issues, as we slightly reword them, for our review:

- (1) Whether trial court err in finding Husband to be in willful contempt.
- (2) Whether the trial court erred in failing to find Wife in contempt and in determining that Tennessee Rule of Civil Procedure 37.01 applies only to civil contempt.
- (3) Whether Wife's production of records the day after the contempt hearing amounts to a sanctionable offense such that the case should be remanded for retrial.

Analysis

Criminal contempt actions have long been used to protect the dignity and authority of the court. *E.g., Robinson v. Air Draulics Eng'g Co.*, 377 S.W.2d 908, 912 (Tenn. 1964). Criminal contempt should be imposed only in appropriate cases "when necessary to prevent actual, direct obstruction of, or interference with, the administration of justice." *Id.* A determination of contempt is within the sound discretion of the trial court, subject to the provisions of the law. *Id.* Generally, the trial court's decision will not be disturbed absent an abuse of discretion. *Id.* One charged with criminal contempt is presumed innocent until found guilty beyond a reasonable doubt. *Id.* On appeal following a finding of contempt, however, the defendant must overcome the presumption of guilt by demonstrating that the evidence preponderates against the trial court's findings. *Id.*

In this case, Husband does not contend that he did not make the unquestionably derogatory remark with which he is charged. Rather, he asserts the remark was not harassment as determined by the court, and that the parties child was asleep during the April exchange. Upon review of the record, we note that, despite the relatively short duration of this marriage, this has been a contentious divorce. Although Husband's remark was undisputedly rude and inappropriate, we agree that it did not rise to the level of harassment.

We urge Husband to complete the parenting class recommended by the trial court. However, the imposition of a jail sentence in this case, where Wife filed her petition for contempt in response to a remark made eight months earlier; where only one remark is alleged with specificity; and where Wife appears to have filed her petition in response to the petition filed by Husband, does little to protect the administration of justice or the dignity of the court. We accordingly reverse the trial court's judgment finding Husband in contempt of court.

We next turn to Husband's allegation that the trial court erred in failing to find Wife in contempt where, the day after the February hearing, Wife sent Husband's counsel statements regarding the disputed bank account, an account which apparently had been closed sometime

between September and December 2006.² Husband alleges that these statements reveal that Wife transferred \$4,000 to the account one month prior to filing for divorce, and that Wife did not sign a release granting Husband access to her records until January 29, 2008, after his petition for contempt was filed.

The evidence contained in the record illustrates that the disputed account had been closed when Husband served Wife with his request for production of documents in March 2007. Further, Wife undisputedly had signed a release granting Husband access to her bank records prior to the hearing of this matter, and it appears that the funds in the disputed account were transferred to an account previously disclosed to Husband. We find no evidence of a willful failure on Wife's part to disobey the court's order. Certainly, no "evidence beyond a reasonable doubt" exists in this record. We affirm.

Holding

The trial court's order finding Husband in contempt is reversed. The trial court's order denying Husband's petition for contempt against Wife is affirmed. In light of this holding, additional issues are pretermitted. Costs of this appeal are taxed one half to Appellee, Deborah M. Gentile, and one-half to Appellant, Michael C. Gentile, and his surety, for which execution may issue if necessary.

DAVID R. FARMER, JUDGE

²The statements contained in the record indicate a \$0 balance in account ending 6904, the account in dispute, on September 13, 2006, and no activity through December 29, 2006.